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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-609

FRANK ANDRE, ET AL.,

Petitioners,

vs.

BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, COOK COUNTY, ILLINOIS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LAWRENCE JAY WEINER, ESQ.
One North LaSalle Street
Chicago, Illinois 60602
Attorney for Petitioners

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in the case of *Frank Andre, et al.* v. *Board of Trustees of the Village of Maywood, Cook County, Illinois, et al.*, No. 77-1337, decided July 27, 1977.

OPINIONS BELOW.

The opinion of the Court of Appeals affirming the judgment of the district court dated July 27, 1977, has not been reported and is Appendix A hereto. The memorandum opinion of the district court dismissing the complaint dated March 4, 1977, has not been reported and is Appendix B hereto.

JURISDICTION.

The decision of the Circuit Court of Appeals sought to be reviewed is dated and was entered on July 27, 1977. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1), providing for jurisdiction on writ of certiorari granted to persons appealing from a decision of a United States Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW.

Is this case controlled by the decisions of this Court in *Detroit Police Officers Ass'n* v. *City of Detroit* and *McCarthy* v. *Philadelphia Civil Service System?*

Did the challenged ordinance establishing a residency requirement which applied retrospectively to all Maywood employees, arbitrarily and unreasonably deprive plaintiffs of existing vested and/or contractual rights in violation of the due process clause?

Is the challenged ordinance a retrospective law requiring strict or special constitutional scrutiny?

Is the challenged ordinance an impairment of the obligation of contract in violation of Article I, § 10 of the Constitution of the United States?

Should the challenged ordinance require application of the compelling state interest test under the equal protection clause?

Should the district court have considered the state law claims under pendent jurisdiction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional and statutory provisions involved are set forth in Appendix C hereto.

STATEMENT OF THE CASE.

The petition arises from a challenge by plaintiffs, consisting of firemen, policemen and other municipal employees, to the constitutional validity or ordinance CO-75-9 (set forth in Appendix C hereto), adopted by the defendant Board of Trustees of the defendant Village of Maywood, an Illinois municipal corporation, which ordinance established a residency requirement for all Village employees.[1]

Prior to the adoption of the challenged ordinance, the defendants had never made residency a term or condition of employment, nor ever indicated that there was such a requirement.[2] In

1. The ordinance required all department heads and administrative personnel to establish residency within the Village of Maywood within two years, and all other officers and employees within four years, from the date of the enactment thereof.

2. It should be noted that Section 3-14-1 of the Illinois Municipal Code, *Ill. Rev. Stat.*, ch. 24, § 3-14-1 (1975), provides *inter alia:*

> "No person shall be *eligible* to any municipal *office* unless he is a qualified elector of the municipality and has *resided therein at least one year* next preceding his election or appointment. . . .
>
> ". . . [M]unicipalities . . . are hereby authorized and empowered to adopt ordinances which *allow firemen and policemen to reside outside the corporate limits of the municipality* by which they are employed both at the time of appointment and while serving as such firemen and policemen." (Emphasis supplied.)

However, it is respectfully submitted that Section 3-14-1 is a questionable durational residency requirement; and, in any event, is not applicable to all of the plaintiffs. In addition, plaintiffs contend that § 3-14-1 should be construed as an eligibility requirement prerequisite to employment, but not as a continuing condition thereof. Defendants responded to the later argument before the district court stating, *inter alia:*

> "Plaintiffs argue that Section 3-14-1 should be construed to require residency only at the time an individual becomes an officer of the Village, and should not be construed to require residency throughout the time that an officer holds his position. However, the statutory requirement that no person is eligible to a municipal office unless he resides in the municipality is a requirement

(Footnote continued on next page.)

addition, on June 24, 1971, the defendants adopted Section I(B)(2) of the Maywood personnel code (set forth in Appendix C hereto), which provided:

> In hiring new employees, preference will be given Maywood residents—all other factors being equil. [sic] If qualified village residents do not apply, then non-residents may be employed in any position.

The aforesaid ordinance applied to all employees; and, plaintiffs contend, constituted an exercise of the option provided under the last paragraph of Section 3-14-1 with respect to the plaintiff policemen and firemen.

By reason of the aforesaid, and with the full knowledge and consent of defendants, a substantial percentage of Village employees (including approximately eighty-five percent of the firemen and fifty percent of the policemen) commenced and/or continued their employment (some for more than 20 years) living outside the municipality.

After the passage of the challenged ordinance, plaintiffs instituted this action in the district court on March 19, 1976, under 42 U. S. C. § 1983 and various provisions of the Constitution, alleging violations of the due process and equal protection clauses of the Fourteenth Amendment, and *ex post facto* and impairment of the obligation of contracts clauses of Article I, § 10, of the Constitution of the United States, and a breach of their employment contract under Illinois law.

(Footnote continued from preceding page.)

of continuing eligibility which must be met during the entire period a person holds office. Cf. *People ex rel.* v. *Ballhorn*, 100 Ill. App. 571 (1901), *People ex rel.* v. *Kirkpatrick*, 164 Ill. App. 328 (1911), 1941 Revision-Commission Notes to § 3-14-1 of the Illinois Municipal Code, S. H. A. Ch. 24, § 3-14-1 p. 467 (1962 ed.). This is illustrated by the fact that the officers covered by Section 3-14-1 include the Village President and Trustees, members of the Board of Fire and Police Commissioners, as well as policemen and firemen. It would be unreasonable to read Section 3-14-1 as requiring a Village Trustee to live within the Village at the time he is elected but not to require him to live in the Village throughout his term in office."

On March 4, 1977, the district court granted defendants' motion to dismiss, the memorandum opinion thereof being Appendix B hereto. On March 8, 1977, plaintiffs filed a Notice of Appeal. On July 27, 1977, the Court of Appeals affirmed the judgment of the district court, the opinion thereof being Appendix A hereto.

REASONS FOR ALLOWANCE OF WRIT.

It is respectfully submitted that petitioners should be permitted to file this petition for writ of certiorari to review the July 27, 1977 judgment of the Court of Appeals by reason that the issues of retrospective nondurational residency requirements and the standard to be applied with respect thereto are important questions of federal law which have not been determinatively decided and which should be settled by this Court.

I.

It is respectfully submitted that the present case is not controlled by the decisions of this Court in *Detroit Police Officers Association* v. *City of Detroit*, 405 U. S. 950 (1972) and *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U. S. 645 (1976). In the *Detroit Police* case, plaintiffs challenged a residence requirement on the equal protection ground that it applied more stringently to policemen than to other city employees. Plaintiffs therein did not contend that the requirement violated a vested and/or contractual right, or any of the other fundamental constitutional rights hereinafter discussed, requiring justification by a compelling state interest standard.

In *McCarthy*, the ordinance was not retrospective as applied therein, the plaintiff having moved from the city in defiance of a preexisting and continuous residency requirement, and the employees therein having accepted employment subject to the ordinance requiring that each such employee "be a resident *at the time* of his application." 424 U. S. at p. 646. In this case

the ordinance is a retrospective residency requirement, which plaintiffs contend vitiates certain antecedent vested and/or contractual rights without due process of law, as well as other rights specified below including those contained in the contracts clause, which are issues not considered or decided in *McCarthy*. Moreover, the ordinance in this case is neither a continuous residence requirement, *i.e.* continuous or prospective from the time of application, as in *McCarthy*, nor a durational residence requirement, as in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972). If anything, it is a discontinuous residence requirement because it is extended backwards to penalize plaintiffs for exercising fundamental constitutional rights which were not restricted upon their application for employment or at any time thereafter prior to the adoption of the challenged ordinance.

In *McCarthy*, the plaintiff consented to the restriction on his right to travel at the time of his application; and this consent was and still is the determinative factor in exempting a prospective residence requirement (albeit restricting a fundamental right) from strict judicial scrutiny. The plaintiffs in this case did not consent to any restriction on their fundamental rights. Indeed, they accepted and relied upon the defendants' offer of employment without any restriction of their fundamental rights.

The challenged ordinance is therefore respectfully submitted to be a "penalty" on the exercise of a previously unrestricted fundamental right, protected by the Fourteenth Amendment. By forcing plaintiffs to choose between their homes and their careers, the "penalty" imposed by Maywood is certainly more severe and unexpected than the penalty of the "waiting period" in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

The district court and court of appeals, however, upheld the ordinance with respect to both past and prospective employees on a test of minimal rationality, relying upon *McCarthy*. The courts did not consider the case in the context of a retrospective law or employment relationship establishing rights

which it is contended should require at least the application of the compelling state interest standard. The challenged ordinance also imposes a harsh and impermissible penalty on plaintiffs for exercising a fundamental constitutional right (*i.e.*, the right of travel) which had not been restricted by Maywood in any way at the time of its exercise.

Moreover, as a retrospective or *ex post facto* law, the Maywood ordinance is addressed primarily to acts which predate its passage. On the basis of such acts, it impairs or supersedes a previous obligation of contract created by an earlier ordinance which authorized plaintiffs to live outside the Village, in violation of Article I, § 10 of the United States Constitution, prohibiting the impairment of contract rights. Lastly, even if the contract clause is not applicable, the ordinance arbitrarily deprives plaintiffs of a vested right in violation of the Fourteenth Amendment.

On the various grounds cited herein, plaintiffs submit that the relaxed standard of judicial review of a municipal employee residence requirement, approved in *McCarthy*, has no application here and that a compelling state interest standard is appropriate under the circumstances.

II.

Plaintiffs respectfully submit that the ordinance at issue which establishes a residency requirement deprives them of a preexisting vested right to live outside Maywood, and that the ordinance is in violation of the due process clause of the Fourteenth Amendment.

Long before 1971, the Village of Maywood had knowingly acquiesced in and consented to the continuous nonresidency of plaintiffs, who remained living outside Maywood in substantial reliance thereon. In 1971, as stated above, the Village passed an ordinance which it is contended expressly approved and authorized their right to live outside Maywood. While there is no "vested right" in the existence of a public law, the 1971

ordinance was also an expression and confirmation of the prior relationship between Maywood and its employees regarding their condition of nonresidence. In this type of situation, a legislative ordinance will "enter into and form a part of" the contract (i.e., the employment contract) between the parties just as if it had been "expressly referred to or incorporated into" the terms of the contract. See: *Wood* v. *Levett,* 313 U. S. 362, 370 (1941).

It is well established that no municipality can pass a retrospective law interfering with a vested right by merely relying on the police power. See, *e.g., Etter* v. *Tacoma,* 228 U. S. 148 (1913); *U. S. Gypsum Co.* v. *Graf Bros .Cooperage Corp.,* 389 F. 2d 252, 256 (8th Cir. 1968). See also: *U. S. ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 536, 544 (1950). This is true even when the right has "vested" under a repealed or superseded ordinance.

This Court has recognized this basic principle of Fourteenth Amendment due process by refusing to apply retrospectively any law which might interfere with a vested right. *Greene* v. *United States,* 376 U. S. 149, 160 (1963) and *Union Pac. R. Co.* v. *Laramie Stock Yards Co.,* 231 U. S. 190, 199 (1913). See: *South East Chicago Com'n* v. *Hud,* 488 F. 2d 1119, 1123 (7th Cir. 1973). As stated by this Court in *Greene* v. *United States,* 376 U. S. at p. 160:

> "[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] *a retrospective operation will not be given to a statute which interferes with antecedent rights* . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature'." (Emphasis supplied)

This same principle is just as prominent in Illinois decisions. See: *People ex rel. Ertel* v. *Lindheimer,* 371 Ill. 367 (1939); *Hogan* v. *Bleeker,* 29 Ill. 2d 181 (1963); *Smith* v. *Hill,* 12 Ill. 2d 588 (1957); *Ward* v. *Village of Elmwood Park,* 8 Ill. App. 2d 37 (1956); *Cooney* v. *F. Landon Cartage Co.,*

308 Ill. App. 444 (1941). In voiding retrospective laws, Illinois courts have not been reluctant to find "vested rights" for due process protection. In *People ex rel. Skokie Townhouse Builders* v. *Village of Morton Grove,* 16 Ill. 2d 183 (1959), the plaintiff had purchased certain property for the construction of townhouses, a use permitted by an existing ordinance. The Illinois Supreme Court found that as soon as the building permit issued, the builder had acquired a vested right which could not be withdrawn by subsequent repeal of the ordinance under which it was acquired. Similarly, under this same type of "constitutional estoppel", the Village of Maywood cannot defeat the vested rights of plaintiffs to live outside Maywood by repealing the ordinance under which these rights were acquired. See: *U. S. Gypsum Co.* v. *Graf Bros. Cooperage Corp.,* 389 F. 2d 252, 256 (8th Cir. 1968). Accordingly, even if it does meet the test of minimum rationality, the new Maywood ordinance cannot deprive plaintiffs of their vested rights.

In this case, the district court and Court of Appeals did not even inquire whether vested rights were at stake, irrespective of the explicit allegations of the complaint to that effect. The courts completely failed to realize that the Maywood plaintiffs, unlike the employees in the *McCarthy* case, had demonstrable interests which could be protected under the equal protection and due process clauses. See: *Wieman* v. *Updegraff,* 344 U. S. 183 (1952).

III.

It is respectfully submitted that the Maywood Ordinance is clearly a retrospective law, *i.e.,* one that interferes with a preexisting vested contract right, affecting or attaching a new disability with respect to a previous transaction. See: *Ohlinger* v. *U. S.,* 135 F. Supp. 40, 42 (D. C. Idaho 1955); *Pan Am. Pet.*

Corp. v. *Gibbons,* 168 F. Supp. 867, 875 (D. Utah 1958); and *U. S. Steel Credit Union* v. *Knight,* 32 Ill. 2d 138 (1965). For the reasons herein before set forth, such a retrospective law should be subject to special constitutional inquiry. However, an analysis of the opinions of the district court and Court of Appeals is appropriate under the circumstances.

The adopted memorandum opinion of the district court in the case of *Cook County College Teachers, Local 1600* v. *Taylor, et al.,* ..... F. Supp. ..... (Appendix B), avoids the issue by improperly redefining (contrary to applicable precedent) what has been clearly recognized as constituting a retrospective law.

First, the memorandum opinion asserts that the law is not retrospective because it is "an operational regulation" rather than an "employment qualification"; but without explanation of what that signifies, it is admitted that plaintiffs will of course lose their jobs anyway if they fail to relocate, whether it is an employment qualification or an operational regulation that plaintiffs are not meeting.

Next, the memorandum opinion asserts that the law is not retrospective because it requires employees to relocate at a future date. Even if such a law is retrospective, the opinion states that it is not *"ex post facto"* because it does not absolutely deprive anyone of a job who is willing to relocate.

In the *Cook County* case, the district court was correct in finding that any loss of employment under a residency requirement ultimately depends on a future act (*i.e.,* the employee's refusal to relocate), but incorrect in concluding that the fact of that future consequence therefore makes a retrospective law prospective in application. The Maywood ordinance penalizes plaintiffs for past non-residency and forces them to make an unpleasant Hobson's choice as their penalty—either they must give up their present employment (which for some has lasted 20 years or more) or they must give up their homes, their friends and their communities.

Furthermore, whether or not the law "impairs" plaintiffs' vested right of employment (the only claim made in the *Cook County* case), plaintiffs contend that the ordinance in this case does vitiate their particular vested and/or contract rights to reside outside Maywood. No particular vested right such as this was at issue in the *Cook County* case. By the district court's own definition, however, an ordinance would be retrospective—and in the court's words, *"ex post facto"*—if it destroyed altogether a particular vested right. (Footnote 3.) Thus, even the opinion adopted by the district court, assuming *arguendo* its applicability, calls for reversal of the holding in this case.

Similarly, the Court of Appeals found that the challenged ordinance is not retrospective in nature by reason that the ordinance merely "requires Maywood Employees to establish residency within the Village by specified future acts. The ordinance does not penalize those employees living outside Maywood for having so resided in the past." (Appendix A, opinion p. 5.) The analysis manifests an obliviousness to the reality which is the gravamen of this cause. The penalty is almost too obvious to make explicit—it is "merely" the total disruption (economic, social and familial) of the lives of plaintiffs solely by reason of the application of the ordinance in question. The operation and effect of the ordinance is clearly and unequivocally upon acts which predate its passage, divesting rights which were established and came into existence before its enactment.

The protection against such legislation was established early in our judicial history. See: *Terrett* v. *Taylor,* 13 U. S. (9 Cranch) 23, 27 (1850) and *Calder* v. *Bull,* 3 U. S. (3 Dall.) 305, 306-307 (1798). Moreover, this basic principle of applicable jurisprudence has been repeatedly reaffirmed. See: *Lynch* v. *United States,* 292 U. S. 571 (1934); *McCracken* v. *Hayward,* 43 U. S. (2 How.) 587 (1844); and *U. S. Trust Co., of New York* v. *New Jersey,* ..... U. S. ....., 45 L. W. 4418 (1977). See generally: Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 789-97 (1936).

Accordingly, it is respectfuly submitted that the challenged ordinance is a retrospective law requiring strict and special constitutional scrutiny.

IV.

The contract clause of Article I, § 10 of the Constitution, which prohibits any legislative impairment of an obligation of contract, applies to both express and implied contracts, and extends to the contract rights of the plaintiffs herein. *U. S. Trust Co. of New York* v. *New Jersey*, ... U. S. ....., 45 L. W. 4418 (April 27, 1977). Cf. *Coombes* v. *Gety*, 285 U. S. 431 (1932); and *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131 (1885). See: P. Kauper, "What Is A 'Contract' Under The Contracts Clause of The Federal Constitution." 31 Mich. L. Rev. 186 (1931). Plaintiffs contend that the enactment of the challenged ordinance did not merely breach existing contracts between the plaintiffs and the Village authorizing plaintiffs to live outside Maywood; but that the challenged ordinance also in effect repealed the 1971 ordinance which had established those rights.[3] The ordinance may thus be challenged on constitutional grounds, either under the due process clause for interference with a vested and/or contract right, or under the impairment of contract clause for repeal of the prior ordinance and/or breach of plaintiffs' common law contractual relationship, and the district court and court of appeals should have used the standard of strict scrutiny for review thereof.

In *U. S. Trust Co.*, although acknowledging that contract and vested rights created by the state may be lawfully impaired in some cases under the reserved power doctrine, this Court declared that such an impairment must be "reasonable and necessary" to serve a compelling or substantial state purpose, which could not have been foreseen at the time the right was created (45 LW at p. 4425). Furthermore, this Court said

3. It should be noted that plaintiffs contend that their vested and/or contractual rights evolved from two sources—the past practices and policies of the employment relationship and the 1971 ordinance, each of which separately and jointly provide bases for plaintiffs' impairment claims.

that a statute or ordinance creates a vested contractual right where the "language and circumstances" so indicate (45 LW at 4422, n. 13) and that such a right survives that repeal of that statute or ordinance. In applying the guidelines established by this Court for invoking the protections of the Fourteenth Amendment and the contracts clause, it is respectfully submitted that the district court and court of appeals clearly erred in upholding a retrospective law infringing a contract and/or vested right merely by finding that said law met the test of minimum rationality. A state or municipality cannot excuse an impairment of contract simply by citing any legitimate or rational objective for its actions. On the contrary, as this Court directed in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934), it must come forward with convincing evidence which proves that the "impairment" will in fact serve some state interest that is either "vital" or "compelling."

Moreover, in *U. S. Trust Co.*, rejecting the rational basis standard for the reasonable and necessary standard, this Court said:

> "[The state] contend[s] . . . that choosing among these alternatives is a matter for legislative discretion. *But a state is not completely free to consider impairing the obligation of its own contracts on a par with other policy alternatives.* Similarly, a state is not free to impose a drastic impairment when an evident and more moderate course would service its purpose equally well." 45 LW at 4425 (Emphasis added.)

In the instant case, the district court and court of appeals never considered, as this Court held it was bound to do, whether there was a "less drastic alternative" to the challenged ordinance. They completely deferred to legislative discretion. Lastly, even if "reasonable basis" were the proper test, this Court in *U. S. Trust Co.* found there was no reasonable basis for impairment of a contract right in the absence of any changed circumstances which were not foreseen by the state at the time it created the contract right. The Village of Maywood has alleged no changed

circumstances requiring the elimination in 1975 of a vested and/or contract right that it had previously created. Applying the decision of this Court in *U. S. Trust Co.*, therefore, the challenged 1975 ordinance does not even pass muster under the reasonable basis test.

V.

Assuming *arguendo* that plaintiffs do not have an antecedent *contract* right to reside outside Maywood, the challenged ordinance would still violate their prior constitutional right of travel —as well as the related constitutional right to live where they choose. It is true that in *McCarthy* this Court held that the state or municipality could validly restrict the right to travel in some circumstances, stating that it would not "[question] the validity of a condition placed upon municipal employment that a person be a resident *at the time* of his application." 424 U. S. at p. 646 (emphasis in the original). The Court thus left open the question whether such a residency requirement could be validly placed upon the employee *after* he applied and was employed.

In *McCarthy*, although the right to travel was involved, this Court found that the restriction fell under an "exception" to the compelling state interest test, which had been discussed earlier in *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974). In that case, this Court announced that a "valid restriction" of a fundamental right such as the right to travel, would not be reviewed under the "compelling state interest" test, and in deciding *McCarthy*, referred to the exception to the strict scrutiny test which had been introduced in *Memorial Hospital:*

> "[I]n *Memorial Hospital* . . . the Court explained that *Shapiro* [*v. Thompson*] and *Dunn* [v. *Blumstein*] did not question 'the validity of appropriate defined and uniformly applied bona fide residence requirements." 424 U. S. at p. 646.

In *Memorial Hospital*, this Court introduced a distinction between a "valid restriction" on the right to travel and a "penalty" imposed on *unrestricted* exercise of that right. Thus, in cases like *Dunn* and *Shapiro*, the state imposed an improper "penalty" (a waiting period) before new residents who had freely exercised their right to travel would qualify for certain universal and state-provided benefits. In *McCarthy*, however, the employees in that case had previously consented to restrict their right to travel, simply as part of a term or condition of their employment by the state in an arms' length employer-employee relationship. Accordingly, a residency requirement imposed *at the time of application*, with the notice and consent of the rightholder, was determined not to penalize but to validly restrict the *future* unexercised right of travel.

In the instant case, the Maywood plaintiffs, like the plaintiffs in *Shapiro* and *Dunn*, did not consent to or even know of any inherent unilateral state restriction on their constitutional rights. Moreover, since 1971 the plaintiffs were expressly advised of and reasonably relied upon a right to the contrary in accepting and/or continuing employment. The challenged ordinance retroactively penalizes that previous and unrestricted exercise of these rights by requiring them to relocate, impairing the integrity of the right at the time of its exercise. Plaintiffs contend there was no waiver of their constitutional rights *at the time of application*, and it is respectfully contended that waiver of a constitutional right should not be lightly or retroactively presumed.

It is therefore contended that on the basis of *McCarthy's* reliance on *Memorial Hospital*, a residence requirement does in fact restrict the fundamental right of travel, and the issue is whether such a requirement is a "penalty" or an "exception" under the compelling state interest test, which has presumptive application when a fundamental right is restricted. The starting point of analysis is the principle that a retrospective law should always be subject to special constitutional inquiry. Retrospec-

tive laws almost by definition impose a "penalty" or some other unfairness, and plaintiffs earlier contended that this particular retrospective law interferes with vested and/or contract rights. The restriction imposed on the right of travel in this case is clearly a "penalty" because the restriction did not exist and was not even indicated to plaintiffs when they exercised their fundamental right of travel upon becoming and after they had been Maywood employees. Now plaintiffs will be forced to relocate their homes and disrupt their lives for the innocent exercise of that right.

The failure of Maywood to put plaintiffs on notice at the time they relied on their unrestricted constitutional rights, much less seek their consent to restrict this right, precludes any equitable basis on which the Village can claim an "exception" to the compelling state interest test. Under the principles of *McCarthy* and *Memorial Hospital,* this Court should insist on strict judicial review of this retrospective law under the equal protection clause.

Moreover, in *McCarthy* this Court held that the fundamental right to travel had been restricted in a valid manner, and did not consider what other fundamental rights may have been affected. The two additional fundamental rights at issue in this case were the right of intrastate travel, and the right to live where one chooses. Many courts have noted that the right to travel in *Shapiro* and *Dunn* is not based solely on the interstate commerce clause, and have deduced the right of intrastate travel from the broader right of interstate travel. See: *King* v. *New Rochelle Municipal Housing Authority,* 442 F. 2d 646 (2d Cir. 1971); *Welfer* v. *Battaglia,* 343 F. Supp. 143 (D. Del. 1972); and *Eggert* v. *Seattle,* 81 Wash. 2d 840, 505 P. 2d 801 (1973). Furthermore, this Court has indicated on occasion that the right to live where one chooses is also a constitutionally protected fundamental right. See: *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589 (1897). See also: *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). Because *McCarthy* was misapplied, the courts below

never even considered whether these fundamental rights were also infringed.

In *Sugarman* v. *Dougall,* 413 U. S. 634 (1973), this Court struck down a citizenship requirement which barred aliens from public employment in New York State, and applying a standard of strict scrutiny, rejected many of the purposes (such as political and community identity) which have been used to justify a residence requirement. Under strict scrutiny, the requirement was found to sweep much too broadly and indiscriminately to achieve the purposes put forward by the state. If the proper standard of review is applied to the ordinance at issue in this case, plaintiffs submit that it should be striken down for similar reasons. But at the very least, defendants ought to be required to prove such justification under the circumstances herein.

VI.

Lastly, before the lower courts, plaintiffs contended under Illinois law the Village breached its contract, and should have been estopped on equitable grounds from enforcing the ordinance against those employees hired prior to its promulgation. More specifically, it was contended that when a municipality holds out an offer of employment to non-resident applicants, it cannot thereafter unilaterally change the terms and conditions of the offer years after acceptance. Plaintiffs acquired contractual rights by the previous past practices and conduct of defendants, and as a result of the express waiver of the residence requirement thereby in the 1971 ordinance, and those rights should have been held to have survived the repeal of the ordinance. See: *People ex rel. Skokie Town House Builders* v. *Village of Morton Grove,* 16 Ill. 2d 183, 157 N. E. 2d 33 (1959).

Accordingly, the Village should have been estopped by its own acts and representations on which plaintiffs substantially and legitimately relied from imposing a residence requirement on plaintiffs after they commenced and/or continued their em-

ployment. See: *Cities Service Oil Co.* v. *City of Des Plaines*, 21 Ill. 2d 157, 171 N. E. 2d 605 (1961) and *Hickey* v. *Illinois Cent. R. Co.*, 35 Ill. 2d 427, 220 N. E. 2d 415, *cert. denied* 386 U. S. 984 (1966).

It is respectfully submitted that these claims should have been considered by the district court under principle of pendent jurisdiction. *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 722-25 (1966). See: *Hagans* v. *Lavine*, 415 U. S. 528, 545-549 (1974); *Apton* v. *Wilson*, 506 F. 2d 83, 96 (D. C. Cir. 1974); and *O'Connell* v. *Economic Research Analysts, Inc.*, 499 F. 2d 944, 996 (5th Cir. 1974).

CONCLUSION.

The constitutional principles involved herein—due process, equal protection, the prohibition against impairment of the obligation of contract, the rights to travel and live where one chooses, and the restrictions with respect to retrospective legislation—are ineluctably interrelated. In the instant case, application of these principles requires strict scrutiny of a retrospective ordinance which has been applied to penalize these fundamental rights. Accordingly, this Court should prohibit enforcement of this ordinance against those employees hired prior to its promulgation.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE JAY WEINER, ESQ.
One North LaSalle Street
Chicago, Illinois 60602
Attorney for Petitioners

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1337

FRANK ANDRE, et al.,

Plaintiffs-Appellants,

v.

BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-1051—**George N. Leighton**, *Judge.*

ARGUED JUNE 13, 1977—DECIDED JULY 27, 1977

Before PELL and BAUER, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* On August 14, 1975 the Trustees of the Village of Maywood (Maywood) adopted an ordinance which required all department heads and administrative personnel to establish residency within Maywood no later than two years after the date of its passage. All other employees and officers

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

were required by the same ordinance to establish Maywood residency within four years. Plaintiffs,[1] who consist of policemen, firemen, and other municipal employees challenged the validity of the residency ordinance by instituting this action in the district court under 42 U.S.C. § 1983 and various provisions of the Constitution. Plaintiffs are currently employed by Maywood, and reside outside the corporate limits of Maywood.

Maywood responded to the complaint by filing a motion to dismiss. The district court, Judge Leighton, granted the motion to dismiss, indicating that his reasons for doing so were adequately expressed by Judge Decker of the same court in an unreported memorandum opinion dismissing an unrelated action involving a similar residency requirement.[2] In seeking reversal plaintiffs contend that the challenged ordinance operates retrospectively to deprive them of pre-existing vested rights in violation of the due process clause of the Fourteenth Amendment, impairs an obligation of contract in violation of Article I, § 10 of the Constitution, and should be scrutinized for equal protection purposes against a compelling state interest standard. For the reasons stated below, we reject these contentions and affirm the judgment of the district court.

We note at the outset that residency restrictions imposed upon municipal employees as a continuing condition of their public employment have been upheld by numerous courts. Such residency restrictions have been held to be rationally related to legitimate governmental purposes. *E.g. McCarthy v. Philadelphia's Civil Service Commission*, 424 U.S. 645 (1976); *Detroit Police Officers Assn. v. City of Detroit*, 385 Mich. 519, 190

[1] The complaint alleged that the 42 named plaintiffs brought this action in their own behalf and as a class action on behalf of all similarly situated employees of Maywood. The district court did not certify any class under Rule 23(c), Federal Rules of Civil Procedure.

[2] *Cook County College Teachers Union, Local 1600 v. Taylor*, No. 76-C-3299 (N.D. Ill., January 19, 1977). We note that the *Cook County* case is presently on appeal to this Court, No. 76-1266.

N.W.2d 97 (1971), appeal dismissed for lack of substantial federal question, 405 U.S. 950 (1972); *Mogle v. Sevier County School District*, 540 F.2d 478 (10th Cir. 1976); *Wardwell v. Board of Education of City School District*, 529 F.2d 625 (6th Cir. 1976); *Wright v. City of Jackson, Mississippi*, 506 F.2d 900 (5th Cir. 1975); *Miller v. Krawczyk*, 414 F. Supp. 998 (E.D. Wisc. 1976); *Pittsburgh Federation of Teachers v. Aaron*, 417 F. Supp. 94 (W.D. Penn. 1976); *Conway v. City of Kenosha, Wisconsin*, 409 F. Supp. 344 (E.D. Wisc. 1975); *Ector v. City of Torrance*, 10 Cal. 3d 129, 514 P. 2d 433, 109 Cal. Reptr. 849 (1973), *cert. denied*, 415 U. S. 935 (1974); *Hattiesburg Firefighters Local 184 v. City of Hattiesburg*, 263 So. 2d 767 (Miss., 1972); *Abrahams v. Civil Service Commission*, 65 N. J. 61, 319 A.2d 483 (1974); *Salt Lake City Firefighters Local 1645 v. Salt Lake City*, 22 Utah 2d 115, 449 P. 2d 239 (1969); *Kennedy v. City of Newark*, 29 N.J. 178, 148 A. 2d 473 (1959). In at least one case involving a state statute requiring policemen and firemen to reside in the municipality where they are employed, a three-judge district court held that the residency restriction was justified by a compelling state interest. *Krezewinski v. Kugler*, 388 F. Supp. 492 (D.N.J. 1972).

I.

In this case plaintiffs urge us to scrutinize strictly the challenged ordinance because, plaintiffs contend, that ordinance acts retrospectively in violation of due process arbitrarily to deprive them of a pre-existing vested contractual right to live where they choose. In this regard plaintiffs argue that for many years Maywood consented to and allowed them to reside outside the corporate limits of Maywood. Further, plaintiffs point to Section I(B)(2) of the Maywood personnel code which was adopted in 1971 with the passage of an ordinance, and which provides:

> In hiring new employees, preference will be given Maywood residents—all other factors being equil (sic). If qualified Village residents do not apply, then non-residents may be employed in any position.

Plaintiffs then assert that this ordinance was adopted in accordance with *Ill. Rev. Stat.*, ch. 24, § 3-14-1 (1975) which provides in relevant part:

> No person shall be eligible to any municipal office unless he is a qualified elector of the municipality and has resided therein at least one year next preceding his election or appointment . . . .
>
> . . . [M]unicipalities having a population of not more than 500,000 are hereby authorized and empowered to adopt ordinances which allow firemen and policemen to reside outside the corporate limits of the municipality by which they are employed both at the time of appointment and while serving as such firemen and policemen.

It is plaintiffs' principal argument that the 1971 adoption of Section I(B)(2) of the personnel code, together with the past actions of Maywood in allowing its employees to reside elsewhere, created in plaintiffs a vested contractual right to live outside Maywood. The adoption of the 1975 residency requirement ordinance acted to repeal Section I(B)(2)'s "express approval and authorization" to reside outside Maywood and, their argument concludes, resulted in an unconstitutional exercise of the municipality's police power. We do not agree.

Section I(B)(2) does not grant an express approval or authorization to Maywood employees to live outside Maywood. Whatever that ordinance established with respect to hiring preferences, we conclude that it did not serve to create the vested contractual right claimed by appellants here. Nothing in the language of Section I(B)(2) indicates the creation of an absolute unconditional right in plaintiffs to live outside Maywood. Even if Section I(B)(2) did create some interest in the plaintiffs, that interest would have been contingent upon the anticipated continuance of the ordinance. Such an interest does not amount to a vested right.[3] Cf. *Smith v.*

[3] Plaintiffs also argue that the incorporation of § I(B)(2) into their contracts of employment and the action of Maywood for many years in consenting to and acquiescing in employees'

(Footnote continued on following page)

Hill, 12 Ill. 2d 588, 594, 147 N.E.2d 321 (1958); *Goldblatt v. City of Chicago*, 30 Ill. App. 2d 211, 217-218, 174 N.E.2d 222 (1961).

Further, we do not agree with plaintiffs' contention that the challenged residency ordinance is retrospective in nature. We have already concluded that § I(B)(2) and Maywood's past actions with respect to employee residency did not create in plaintiffs an antecedent vested right to reside where they choose, and that any interest to reside outside Maywood was subject to the reasonable exercise of Maywood's police powers. We note in addition that the residency ordinance requires present Maywood employees to establish residency within the Village by specified future dates. The ordinance does not penalize those employees living outside Maywood for having so resided in the past. Under the terms of the ordinance, an employee will be charged with a violation of the residency ordinance not because the employee resided outside Maywood in the past, but rather, an employee will be charged with a violation for failure to establish a Maywood residency within the two or four year period allowed to them to establish such a residency. As such, the challenged ordinance can not be said to penalize activity which was otherwise lawful in the past, and, hence, cannot be considered retrospective in application.

[3] *continued*
residency outside Maywood create a situation in which Maywood should be estopped from denying the existence of their claimed vested rights. We have serious doubts that a municipality can be estopped with respect to its governmental function through the exercise of its police power. Cf. *Hall v. Cook County*, 359 Ill. 528, 195 N.E. 54; *Melin v. Community Consolidated School District No. 76*, 312 Ill. 376, 144 N.E. 13; *Western Pride Builders, Inc. v. Koraska*, 91 Ill. App. 2d 458, 235 N.E.2d 313 (1968). In any event, the complaint does not allege any positive, unequivocal acts on the part of the municipal officers calling for the invocation of an estoppel. *New-Mark Builders, Inc. v. City of Aurora*, 90 Ill. App. 2d 98, 233 N.E.2d 44 (1967).

II.

Plaintiffs also contend that the challenged ordinance served to repeal § I(B)(2), which, together with Maywood's prior acquiescence and consent, had created a contractual obligation on the part of Maywood to allow the plaintiffs to reside outside the Village. The adoption of the residency ordinance, plaintiffs contend, impaired this obligation of contract in violation of Article I, § 10 of the Constitution. The asserted obligation on Maywood's part gives rise to the vested rights claimed by plaintiffs to reside in the place of their choice. For the reasons already given we find no vested contractual right in plaintiffs, and no obligation on Maywood's part giving rise to the claimed right. Without such obligation, there can be no impairment. *Keefe v. Clark*, 322 U.S. 393, 296 (1944).

Plaintiffs argue that this case is to be determined by *United States Trust Company v. New Jersey*, ... U.S. ....., 45 L.W. 4418 (April 27, 1977), in which the Supreme Court held that a State's impairment of a contract such as was involved in that case can only be upheld if it is both reasonable and necessary to serve an important public purpose. *Id.*, 45 L.W. at 4425. Plaintiffs' reliance on the *United States Trust Company* case is misplaced. The obligation impaired in that case was a statutory covenant between New York and New Jersey which limited the use of the Port Authority of New York and New Jersey's revenues and reserves which were pledged as security for its bonds. A New Jersey statute repealed this statutory covenant. The Court concluded that the repealing statute was an impairment of the State's contract and constituted a violation of the contract's clause in the absence of a showing that the impairment was both reasonable and necessary to serve an important purpose claimed by the State. *Id.*, 45 L.W. at 4425-4426. The contract's rights and obligations in the *United States Trust Co.* case were clear, unequivocal, concrete, and statutorily expressed. Such cannot be claimed here. In this case, we have a claimed vested contractual right and an asserted correlative contractual obligation, the genesis of each of which is said to be an

ordinance establishing hiring preferences and Maywood's past actions in acquiescence and consent. Since we have concluded that neither the ordinance nor Maywood's past action give rise to the rights claimed and the obligations asserted, and since we have found that the residency ordinance is not retrospective in character, the challenged ordinance does not impair any obligation of contract.

III.

Plaintiffs alternatively contend that if they do not have antecedent vested contract rights to reside outside Maywood, the challenged ordinance nevertheless requires the application of the strict scrutiny test under the equal protection clause. That test, which requires that legislation be upheld only if it is necessary to serve a compelling state interest, is to be employed to determine the constitutionality of a legislative classification when that classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *Massachusetts Board of Retirement v. Murgia*, ... U.S. ....., 96 S. Ct. 2562, 2566 (1976); *San Antonio Independence School District v. Rodriguez*, 411 U.S. 1 (1973). Plaintiffs contend that the residency ordinance infringes their fundamental rights to interstate travel, intrastate travel, and to live where they choose. The right to travel interstate, although nowhere expressed in the Constitution, has long been recognized as a basic fundamental right. *United States v. Guest*, 383 U.S. 745 (1966). All residency restrictions have an effect on the right to interstate travel, but only those residency restrictions which can be characterized as "durational" have been found to unconstitutionally impinge or penalize the right to travel, in the absence of some compelling state interest. Durational residency requirements classify residents into groups of residents who have fulfilled the residency requirements and those who have not. Where eligibility for government benefits such as welfare, *Shapiro v. Thompson*, 394 U.S. 618 (1969), or medical care, *Memorial Hospital v. Maricopa County*, 415 U.S.

250 (1974), or where the exercise of other fundamental rights such as voting, *Dunn v. Blumstein*, 405 U.S. 330 (1972), are conditioned upon the fulfillment of a durational residency requirement, the classification impermissibly penalizes the fundamental right to travel interstate in violation of the equal protection clause, unless a compelling state interest is shown.

Although it is difficult to see how the travel such as was involved in *Shapiro*, *Dunn* and *Memorial Hospital*[4] is similar to the right to travel claimed in this case, we observe that any classification created by the challenged ordinance simply is not a classification on the basis of a durational residency requirement. Bona fide residency requirements as continuing conditions of municipal employment rest upon footings significantly different from those of durational residency requirements. Indeed, *Shapiro*, *Dunn*, and *Memorial Hospital* were careful to maintain the differences between the two. The fact of residency itself was noted to be distinct from durational (or "waiting period") residency in *Shapiro*, 394 U.S. at 636, and only the latter was found to be unconstitutional. *Dunn* "emphasize[d] again the difference between bona fide residence requirements and durational residence requirements." 405 U.S. at 343. In *Memorial Hospital*, quoting *Dunn*, the Court cautioned that its decision was not intended to "cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements." 415 U.S. at 255.

Recently, such a residency requirement was found in *McCarthy v. Philadelphia Civil Service Commission*, *supra*, 424 U.S. 645, not to violate a municipal employee's right to interstate travel. To whatever extent the right of interstate travel is involved in this case, that right is not penalized unconstitutionally by the type of bona fide continuing residency requirement adopted by Maywood here.

Plaintiffs argue that *McCarthy* is distinguishable from the present case in that *McCarthy* involved a residency requirement existing at the time of an employee's application, whereas here the requirement is imposed

[4] Those cases dealt with travel in the sense of migration. *Shapiro*, *supra*, 394 U.S. at 629; *Memorial Hospital*, *supra*, 425 U.S. at 255-256.

after employment has commenced. Plaintiffs, however, do not indicate how their rights to interstate travel are affected by this distinguishing fact. Furthermore, the claimed right in *McCarthy* was municipal employment while residing elsewhere. The converse of the claim presented in *McCarthy* is asserted here: the right to reside elsewhere while being employed by the municipality. To the extent that *McCarthy* indicates that bona fide residency requirements as continuing conditions of municipal employment do not violate an employee's right to interstate travel, it is dispositive of plaintiffs' contention here. Since appropriately defined and uniformly applied bona fide residence requirements do not impermissibly violate the right to interstate travel, the distinction between such requirements imposed as an initial condition of municipal employment and such requirements imposed as a continuing condition of such employment becomes a distinction without a difference.

Plaintiffs also claim that the challenged ordinance impermissibly infringes their fundamental right to travel intrastate. The claimed right of intrastate travel has been rejected by several courts. *Wright v. City of Jackson, Mississippi*, *supra*; *Abrahams v. Civil Service Commission*, *supra*; *Ector v. City of Torrance*, *supra*. Those cases recognizing a fundamental right of intrastate travel have done so vis-à-vis durational residency requirements. *Wellford v. Battaglia*, 343 F.Supp. 143 (D.Del., 1972), *aff'd.* 485 F. 2d 1151 (3d Cir. 1975), *King v. New Rochelle Memorial Housing Authority*, 442 F. 2d 646 (2d Cir. 1971), *cert. den.* 404 U.S. 863 (1971), *Eggert v. City of Seattle*, 18 Wash. 2d 840, 505 P. 2d 801 (1973). Inasmuch as a durational residency requirement is not involved in this case, we need not consider whether a right of intrastate travel should be acknowledged. Nor do we find any basis for plaintiffs' claim of violation of a fundamental right to live where they choose.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

FRANK ANDRE, et al. *Plaintiffs,* *vs.* BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, COOK COUNTY, ILLINOIS, et al., *Defendants.*	76 C 1051 Before the Honorable George N. Leighton United States District Judge

MEMORANDUM ORDER

This cause is before the court on defendants' motion to dismiss plaintiffs' complaint for failure to state a claim on which relief can be granted. The suit is brought pursuant to 42 U. S. C. § 1983, the due process and equal protection clauses of the 14th amendment to the constitution of the United States, the ex post facto and impairment of the obligation of contracts clauses of Article I, § 10 of the constitution of the United States. A declaratory judgment is sought under the provisions of 28 U. S. C. §§ 2201 and 2202. Jurisdiction is conferred on this court by 28 U. S. C. §§ 1331, 1343; and the action is one whereby plaintiffs on behalf of a class seek declaratory, injunctive relief, and damages to prohibit implementation of Ordinance No. CO-75-9 of the Village of Maywood which requires its employees to reside within the village during the period of their employment.

On February 4, 1977 this court announced that defendants' motion to dismiss would be granted; and that a memorandum opinion would be filed, at which time the order of dismissal will

become final. However, this court has examined the opinion of Judge Bernard M. Decker in *Cook County College Teachers Union, Local 1600, etc., et al.* v. *John W. Taylor, et al.*, ... F. Supp. ..... (76 C 3299), and has decided that the exhaustive discussion of the controlling principles makes unnecessary the filing of a memorandum in this case. Therefore, defendants' motion is granted and the suit herein is dismissed, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for the reason that plaintiff's complaint fails to state a claim on which relief can be granted. *McCarthy* v. *Philadelphia Civil Service Commission*, ... U. S. ....., 96 S. Ct. 1154 (1976); *Detroit Police Officers Association* v. *City of Detroit*, 405 U. S. 950, 92 S. Ct. 1173 (1972); *Massachusetts Board of Retirement* v. *Murgia*, ... U. S. ....., 49 L. Ed. 2d 520 (1976); *Ahern* v. *Murphy*, 457 F. 2d 363 (7th Cir. 1972).

So ordered.

/s/ GEORGE N. LEIGHTON
George N. Leighton
United States District Judge

Dated: March 4, 1977

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, etc., et al., *Plaintiffs*, *vs.* JOHN W. TAYLOR, et al., *Defendants*. — No. 76 C 3299

MEMORANDUM OPINION

The plaintiffs challenge by this action the imposition of a rule requiring employees of the City Colleges of Chicago (Community College District No. 508, County of Cook, State of Illinois) to become residents of Chicago.

Briefly summarized, the rule, adopted on July 23, 1976, requires present employees to obtain residence within the city by July 1, 1980. It specifies that current employees will not be promoted to a position offering higher compensation unless the employee agrees to take up city residence within six months of appointment to the higher position. Newly hired employees must agree to move into the city within six months of employment.

The plaintiffs, the union and union officers representing the affected teachers, have brought a three-count action in this court. Counts I and II are federal civil rights claims brought under 42 U. S. C. § 1983.

Count I alleges that the rule deprives the teachers of equal protection under the laws. It emphasizes that the defendants, who are the members of the Board of Trustees for the City Colleges, have provided that only administrative employees shall receive a $3,000. annual allowance for moving into the city.

The plaintiffs assert that the defendants have established an unreasonable classification of eligibility for the Chicago residency allowance. They further charge that the residency rule is devoid of a rational relationship to its stated purposes.

Count II, brought in behalf of tenured teachers, asserts that the residency rule imposes an *ex post facto* material qualification upon employment within the City College system. The plaintiffs maintain that the residency requirement is onerous and unreasonable, and thereby retroactively diminishes the property right of tenured teachers to expect continued employment. This is said to constitute a violation of due process.

Count III, the pendent claim, alleges that defendants violated the Open Meetings Act, Ill. Rev. Stat. ch. 102 § 41, by the manner in which they adopted the residency rule.

The defendants have moved to dismiss the complaint, and the parties have submitted extensive briefs to the court.

Although the parties have referred to numerous challenges to a variety of residency rules, and have attempted to distinguish the bases of the respective challenges to their validity, the conclusion of the Supreme Court is unavoidable: "[w]e have . . . held that this kind of ordinance is not irrational." *McCarthy* v. *Philadelphia Civil Service Commission,* No. 75-783, 44 U. S. L. W. 3530 (3/22/76). The order of the Court added, "In this case appellant claims a constitutional right to be employed by the city of Philadelphia while he is living elsewhere. There is no support in our cases for such claim."

Previously the Seventh Circuit has held that such rules satisfied the rational relationship test for equal protection, *Ahern* v. *Murphy,* 457 F. 2d 363 (7th Cir. 1972), and the results have been similar in challenges to this type of rule in other courts: *Wardwell* v. *Board of Education,* 529 F. 2d 625 (6th Cir. 1976); *Wright* v. *City of Jackson, Mississippi,* 506 F. 2d 900 (5th Cir. 1975); *Pittsburgh Federation of Teachers* v. *Aaron,* 417 F. Supp. 94 (W.D . Pa. 1976); *Manion* v. *Kreml,* 131 Ill. App. 2d 374 (1st Dist. 1970); *Detroit Police Officers Ass'n.* v. *City of Detroit,* 385 Mich. 519, 190 N. W. 2d 97 (1971),

appeal dismissed for want of substantial federal question, 405 U. S. 950 (1972); *Kennedy* v. *City of Newark,* 29 N. J. 178, 148 A. 2d 473 (1959).

The court is not impressed by the attempted distinction that the claim advanced in most of the above cases concerned the right to interstate travel, whereas the instant claim alleges a different type of constitutional concern, and also asserts that the rule deprives the plaintiffs of property rights without due process. The complaint does not raise any claim which requires the court to subject the rule to "strict scrutiny" or to utilize a test balancing the justification for the rule against the detriment suffered by these plaintiffs.

The Supreme Court has stated that an ordinance with similar residency requirements satisfies the rational relationship test. The articulated reasons for the rule, which include a belief that Chicago residents are more likely to understand the urban problems (racial, social and economic) faced by their students, and the expectation that the taxes and expenditures of employees residing in Chicago will contribute to the support of the City Colleges, closely resemble the reasons found by other courts to provide rational bases for residency rules. *E.g., Wardwell* v. *Board of Education, supra.* The rational relationship test is clearly satisfied, both for the equal protection and the due process claims.

The plaintiffs seek to present evidence that the reasoning of the defendants is not well founded. They assert that they can show that the benefit to the City College coming from the encompassing of the plaintiffs within the city tax base will be marginal and minimal. Such an argument persuaded the court in *Donnelly* v. *Manchester,* 274 A. 2d 789 (N. H. 1971) They also hope to show that the diversity of Chicago communities and residential styles makes it unlikely that mere residency in the city will generate greater teacher-student understanding.

The plaintiffs also desire to introduce evidence which would reveal the extent of the hardship which would be caused by the

uprooting of the 40% of the city college teachers presently residing outside of the city limits.

The short response to this is that the Constitution is not violated so long as a law is not premised upon a patently irrational basis. "Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question of whether it so lacks any reasonable basis as to be arbitrary." *Borden's Co.* v. *Ten Eyck*, 297 U. S. 251, 263 (1936).

It may be that the residency rule promulgated by the defendants is unduly optimistic as to the efficacy of Chicago residency. It may be that this rule is harsh and onerous upon non-resident teachers. It may also be true that the Board could have devised a better rule to achieve its goals, or one "more just and humane". But so long as it has been held that the reasons advanced are not utterly irrational, the rule cannot be held invalid. *Massachusetts Board of Retirement* v. *Murgia*, ... U. S. ....., 49 L.ed. 2d 520 (1976); *Williams* v. *Civil Service Commission of City of Detroit*, 176 N. W. 2d 593 (Mich. 1970). In light of the holding of the Supreme Court in *McCarthy*, there is no basis for any further hearing on the issue of rationality.[1]

It is therefore not necessary for the court to consider in detail the many sub-arguments raised by the briefs. However, certain findings of law do further sustain the conclusion that this complaint fails to state a claim for relief.

The provision of a $3,000. annual allowance to administrators but not to teachers is not violative of the current conception of equal protection. Apparently the Board views this as a necessary inducement to its top administrators to move into the city as soon as possible. The plaintiffs see it as a hardship allowance which is denied to non-administrators. The allowance cannot be strictly viewed as a mere inducement to move to the city since

1. Both of the cases upon which the plaintiffs rely for the principle that they are entitled to a hearing on the rationality of a residency rule were decided prior to *McCarthy*. *Donnelly* v. *City of Manchester*, *supra*, and *Hanson* v. *Unified School District*, 364 F. Supp. 330 (D. Kans. 1973).

it applies to those currently living in the city as well. But it may be fairly characterized as an inducement to move to the city and to retain Chicago residency limited to a favored and especially valued class of employees. This allowance may also reflect a belief that residency within the city is in fact a burden which should be offset by material compensation.

Perhaps it would have been preferable and more just to have extended such benefits to all employees of the City Colleges, or particularly to those who must attempt relocation on less substantial base levels of compensation. But a public employer is allowed to create distinct classes of employees and treat them differently for compensation purposes. *Phelps* v. *Board of Education*, 300 U. S. 319 (1937). And it is not violative of equal protection for the state to utilize its limited funds by the establishment of imperfect classifications which may deal with a problem in an underinclusive fashion. *Dandridge* v. *Williams*, 397 U. S. 471 (1970). Since the establishment of separate categories of teachers and administrators is not founded on an invidious basis which compels strict scrutiny, it cannot be said that the instant scheme deprives the plaintiffs of equal protection.

The court recognizes that tenured teachers have certain property rights in their positions which are guaranteed by the requirement of due process. *Board of Regents* v. *Roth*, 408 U. S. 564 (1972). However, the rule is essentially an operational regulation for the governance of the system, rather than an employment qualification. *Manion* v. *Kreml*, *supra*. Nor is it an *ex post facto* rule which retroactively curbs the tenure rights of teachers. Such a rule is prospective in operation, and limits the current employment rights of only those who fail to relocate within four years.[2]

2. It is argued that the six month rule also affects those teachers seeking promotions, and thus limits their tenure rights as established by the current contract with the city college system. But the teachers do not have any property right in promotions to another position with higher pay. Furthermore, as noted, *infra*, this rule does not infringe upon the guarantees of tenure.

The plaintiffs argue with some correctness that this rule imposes an additional requirement for the retention of employment within the city college system. But every regulation adopted by a public employer in some way modifies the previous conditions of employment. And wilful violation of any new rule may provide cause for dismissal under both the principles of tenure and the current contract.

As long as the new regulation does not render it impossible for tenured employees to comply and retain employment, it cannot be said to deprive them of any property rights.[3] They retain their due process rights to discharge only upon cause found after a hearing, but are not sheltered from attempts by the defendants to alter or modify the operations of the city college system.

The court finds that the plaintiffs have failed to state a claim under the Constitution and § 1983 against the validity of the challenged residency rule. Accordingly, Counts I and II of the instant complaint must be dismissed, and Count III must fall for want of pendent jurisdiction. The motion of the defendants to dismiss the instant complaint is therefore granted, and the instant cause is ordered dismissed.

ENTER:

/s/ BERNARD M. DECKER
United States District Judge

Dated: January 19, 1977.

3. The instant regulation can be contrasted with a hypothetical new rule which would limit teaching positions exclusively to individuals with 20/20 uncorrected eyesight. While a tenured teacher can move within the city and comply with the challenged rule, the hypothetical rule could not be satisfied by a tenured teacher with less than perfect eyesight. The latter would have a retroactive, *ex post facto* effect and would undermine the property interest in a tenured position.

APPENDIX C

The following is the text of provisions of the United States Constitution, the Illinois Statutes and the Village of Maywood Ordinances which are referred to in the defendants' brief.

Article I, Section 10 of the United States Constitution provides in relevant part as follows:

> No State shall enter into a Treaty, Alliance, or Confederation; grant Letters or Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat., 1975 Chapter 24 Section 3-14-1 provides as follows:

> No person shall be eligible to any municipal office unless he is a qualified elector of the municipality and has resided therein at least one year next preceding his election or appointment. However, these requirements shall not apply to the municipal engineer, health officers, or other officers who require technical training or knowledge. Nor shall these requirements apply to city attorneys or to village attorneys. But no person shall be eligible to any municipal office who is a defaulter to the municipality.
>
> Except for incorporated towns which have superseded a civil township, municipalities having a population of not

more than 500,000 are hereby authorized and empowered to adopt ordinances which allow firemen and policemen to reside outside of the corporate limits of the municipality by which they are employed both at the time of appointment and while serving as such firemen or policemen.

Section I(B)(2) of the Village of Maywood personnel code which was adopted with the enactment of Village of Maywood ordinance number CO-71-10 provides as follows:

> In hiring new employees, preference will be given Maywood residents—all other factors being equil. (sic) If qualified village residents do not apply, then non-residents may be employed in any position.

Village of Maywood Ordinance No. CO-75-9 provides as follows:

AN ORDINANCE ESTABLISHING RESIDENCY REQUIREMENTS FOR PRESENT EMPLOYEES AND PRESENT OFFICERS OF THE VILLAGE OF MAYWOOD

BE IT ORDAINED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, COOK COUNTY, ILLINOIS, A HOME RULE MUNICIPALITY, AND AS AN EXERCISE OF ITS HOME RULE AUTHORITY, as follows:

SECTION ONE: That Chapter 36 of the Maywood Village Code, 1955, as amended, be and the same is hereby further amended by adding thereto additional sections which shall read as follows:

SECTION TWO: That it is hereby declared the policy of the Corporate Authorities of the Village of Maywood that all employees, department heads, supervisory and administrative personnel and appointed officers, paid either on an hourly or salaried basis be, and the same are hereby required, to reside within the Village of Maywood throughout their terms of office and/or length of employment, but with the express exclusion of those persons supplying services on a limited contractual basis who are actually in

the employ of another governmental unit and/or private organization.

SECTION THREE: That all department heads and administrative personnel currently employed or appointed by the Village of Maywood who have not resided within the Village prior to the adoption of this ordinance shall be required by the Corporate Authorities to establish residency within the Village of Maywood no later than two (2) years after the date of passage of this ordinance.

SECTION FOUR: That all other employees and officers currently employed by the Village of Maywood who have not resided within the Village prior to the adoption of this ordinance shall be required by the Corporate Authorities to establish residency within the Village of Maywood no later than four (4) years after the date of passage of this ordinance.

SECTION FIVE: That non-compliance with the residency requirements set forth in this ordinance by any officer or employee of the Village of Maywood shall constitute grounds for immediate dismissal. The Village Manager is hereby directed to invoke such penalty of immediate dismissal or to take such action as is necessary to bring about dismissal upon failure to comply within the terms prescribed in Sections Three and Four above.

SECTION SIX: That all requirements set forth in the Village of Maywood Personnel Manual, except where they conflict with the terms of this ordinance, are in full force and effect.

SECTION SEVEN: That the Village Manager, at his discretion, may waive any residency requirement for any officer or employee due to documented extenuating circumstances or where such office of employment requires special technical training or knowledge. Under no circumstances shall the residency requirement be waived for more than one year beyond the allotted time period without formal approval by the Village Board.

SECTION EIGHT: That enforcement of this ordinance shall be solely under the jurisdiction of the Village Manager in his capacity as Chief Administrative Officer of the Village and the Village Manager shall, immediately after

passage of this ordinance, inform all officers and employees, in writing, of the full terms of this ordinance.

SECTION NINE: That all ordinances or parts of ordinances in conflict herewith are to the extent of such conflict hereby repealed.

SECTION TEN: That this ordinance shall be in full force and effect from and after its passage, approval and publication in pamphlet form as provided by law.